DATO' IBRAHIM HJ ISMAIL & ANOR

v.

ONSTREAM MARINE SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
HAIDAR MOHD NOOR J
[WINDING UP NO: D5-28-258-97]
31 MARCH 1998

CIVIL PROCEDURE: *Striking out - Winding-up petition - Whether court should exercise its discretionary power to strike out winding up petition without a trial - Whether petition an abuse of process of court - Rules of the High Court 1980, O. 92 r. 4*

COMPANY LAW: *Winding up - Just and equitable rule - Companies Act 1965, s. 218(1)(i)*

The petitioners petitioned for the winding-up of the first respondent ('Onstream') pursuant to s. 218(1)(i) of the Companies Act 1965, on the just and equitable ground. The second, third and fourth respondents filed a notice of motion for the petition be struck out pursuant to and under the inherent jurisdiction of the instant court on the ground that it was an abuse of the process of the court under O. 92 r. 4 of the Rules of the High Court 1980. The issue was whether the court should exercise its discretionary power under its inherent jurisdiction to strike out the petition without a trial.

Held:

[1] The court has the jurisdiction to strike out a petition before discovery is complete and before any cross-examination.

[2] The petitioners' claims were manifestly unsustainable or an abuse of the process, and justice required that the petition be struck out.

[3] The equitable relief sought by the petitioners was a drastic remedy and it must be addressed to a serious condition affecting the proper conduct or management of Onstream's affairs. This case involved a mere domestic quarrel between shareholders, and Onstream itself was the proper forum for the settlement.

[Petition struck out with costs.]

Cases referred to:
Ebrahimi v. Westbourne Galleries Ltd & Ors [1973] AC 379 ***(foll)***
Foo Ban Nyen v. Foo Yet Kai & Sons Sdn Bhd & Ors [1991] 2 CLJ 1364 ***(cit)***
Re Blue Arrow Plc [1987] BCLC 585 ***(refd)***
Re Grimm's Foods Ltd 99 DLR (3d) 377 [1980] ***(foll)***
Re Lo Siong Fong [1994] 2 MLJ 72 ***(not foll)***
Re Ringtower Holdings Plc [1989] 5 BCC 82 ***(refd)***
Re Saul D Harrison & Sons Plc [1994] BCC 475 ***(aff)***
Williams & Hubert v. W & H Trade Marks (Jersey) Ltd [1986] AC 368 ***(aff)***

Legislation referred to:
Companies Act 1965, s. 218(1)(i)
Rules of the High Court 1980, O. 1 r. 2(2), O. 18 r. 19, O. 92 r. 4

For the petitioners - David Morais (Gopal Sreenevasan); M/s Sivananthan
For the 2nd, 3rd & 4th defendants - Loh Siew Cheang (Robert Low with him); M/s Cheang & Ariff

Reported by Hjh Siti Faridah Abd Jabbar

JUDGMENT

Haidar Mohd Noor J:

The petitioners, Dato' Ibrahim bin Hj. Ismail ("Ibrahim") and Datin Hamidah bte Abdul Hamid ("Hamidah") presented this petition for the winding-up of the first respondent, Onstream Marine Sdn. Bhd. ("Onstream") pursuant to s. 218(1)(i) of the Companies Act 1965, that is, on just and equitable ground.

Seacorp Venture Capital Sdn. Bhd. ("Seacorp"), Cartarama Sdn. Bhd. ("Cartarama") and Dato' Nasaruddin bin Abdul Jalil ("Nasaruddin") were named as the second, third and fourth respondents respectively in this petition.

An affidavit verifying the petition is filed by Ibrahim (encl. 2).

Various steps were taken by the petitioners including the obtaining of the Registrar's Certificate in respect of the petition (encl. 8).

Notice of intention to oppose the petition was filed by Seacorp, Cartarama and Nasaruddin through their solicitors, M/s Cheang & Ariff. Onstream was not represented by any solicitors though the petition was duly served on it.

The petition was fixed for hearing on 7 October 1997.

In the meantime Seacorp, Cartarama and Nasaruddin filed a notice of motion on 4 October 1997, (encl. 12) for the petition against them be struck out pursuant to and under the inherent jurisdiction of this court on the ground that it is an abuse of the process of the court under O. 92 r. 4 of the Rules of the

High Court 1980 ("RHC"). It is supported by the affidavits of Nasaruddin (encl. 10) and Abdul Wahid bin Omar, a director of Seacorp (encl. 11). Nasaruddin also filed his affidavit on behalf of Cartarama. He is a director of Onstream and Cartarama.

The counsel for Seacorp, Cartarama and Nasaruddin was of the view that O. 18 r. 19 of RHC is not applicable and hence the motion under O. 92 r. 4. I suppose he based it on the case of *Re Lo Siong Fong* [1994] 2 MLJ 72 where VC George J (as he then was) was of the view that O. 18 r. 19 has no application to a s. 218 petition by virtue of O. 1 r. 2(2) of RHC and that Companies (Winding Up) Rules 1972 have been made in respect of winding-up petitions. With respect, I have my reservations.

Brief Facts

Seacorp, Cartarama and Nasaruddin as well as the petitioners are shareholders of Onstream at the time of the filing of this petition.

The petitioners did not file any affidavit in reply to the affidavits filed by Nasaruddin (encl. 10) and Abdul Wahid bin Omar (encl. 11). In that event the facts deposed in encls. 10 and 11 are not disputed by the petitioners especially in respect of the facts deposed in encl. 11 at:

(i) paragraph 7 where the authorised share capital in respect of the preference shares as stated in paragraph 2.1(b) of the petition should read as 10,000,000 instead of 5,500,000; and

(ii) paragraph 10 where the memorandum and articles of association of Onstream produced as exhibit "D" in the petition is an incomplete instrument. Several amendments were made to the memorandum and articles of Onstream on 2 August 1995 by the petitioners at an extraordinary general meeting of Onstream (see exhibit "WO1" in enclosure 11).

Onstream was incorporated on 8 August 1992 as a private limited company in Malaysia and has its registered office at 15th Floor, Bangunan Kompleks Kewangan, 82, Jalan Raja Chulan, 50200 Kuala Lumpur.

At all material times the petitioners were the registered shareholders of 1,335,000 ordinary shares in the issued and paid up capital of Onstream. Ibrahim is a registered shareholder of 667,500 shares and Hamidah is a registered shareholder of 667,500 shares.

As at the date of incorporation of Onstream, the petitioners were its sole directors.

Entry Of Seacorp Into Onstream

It is common ground that Seacorp was introduced to Onstream because Onstream was attempting to raise capital to enable it to acquire interests in another private company known as Scomi Sdn. Bhd. ("Scomi"). Ibrahim represented Onstream.

The acquisition of Scomi was estimated to cost in the region of RM16,000,000. The petitioners were required to raise financing or seek additional investors in order to meet the acquisition costs.

As a result Seacorp was invited to subscribe for preference shares in Onstream which are to be, *inter alia*, redeemable by Onstream or convertible into ordinary shares by Seacorp. Onstream proceeded to amend its memorandum and articles of association at the extra-ordinary general meeting (EGM) held on 2 August 1995 by the petitioners (see exh. "WO1" in encl. 11).

After the amendments to the memorandum and articles of association were made at the EGM, Seacorp agreed and decided to take up the preference shares in Onstream. Seacorp was given a copy of "WO1".

Seacorp then entered into a subscription agreement (exh. "H" in encl. 2). The rights and obligations contained in exh. "H", save for contextual differences in the usage of language, are identical to those contained in the amendments.

Seacorp contended that its membership in Onstream and its relationship with Onstream and such other of its other members are exclusively laid out in the following documents:

(i) the memorandum and articles of Onstream, as amended at the EGM (exh. "WO1");

(ii) the subscription agreement (exh. "H");

(iii) the guarantee and indemnity dated 8 August 1995 made between the petitioners and Seacorp; and

(iv) the call option agreement dated 8 August 1995.

In the circumstances, the alleged agreement as to the partnership as averred to in paras 7.4 to 7.5 of the petition is denied by Seacorp. In fact, so far as Seacorp is concerned, its principal business is to make investments in equities of companies in the hope of making returns on its investments. Onstream is not the only company in which Seacorp has made investments in equity.

Seacorp states that the legitimate expectations and rights as contended in paras 8.1.1 to 8.1.8 of the petition are unmeritorious. As far as Seacorp is concerned, they simply do not exist and further reiterated that Seacorp is a member of Onstream, plain and simple and its relationship with Onstream and the petitioners are embodied in the various documents which formed the basis of its relationship.

Entry Of Cartarama and Nasaruddin Into Onstream

Nasaruddin is a director of Onstream and Cartarama.

Nasaruddin and Cartarama only became shareholders of Onstream and were issued with ordinary share certificates on 4 September 1996 (see exh. "DN-l" in encl. 10). When Cartarama and Nasaruddin became shareholders of Onstream in 1996, Scomi was already a subsidiary of Onstream, therefore Cartarama and Nasaruddin have no knowledge or personal knowledge of the matters stated in paras. 6.1 and 6.2 of the petition (pertaining to acquisition of Scomi) or of the circumstances pursuant to which Onstream acquired its interests in Scomi. Cartarama and Nasaruddin became members of Onstream on the basis of the amended memorandum and articles of association of Onstream.

In the circumstances Cartarama and Nasaruddin have no knowledge or personal knowledge of the matters averred to in paras. 7.1 to 7.6 of the petition relating to alleged "partnership". Neither do Cartarama and Nasaruddin have any knowledge whatever of nor were they privy to the purported legitimate expectations as averred to in paras. 8.1.1 to 8.1.8 of the petition. Cartarama and Nasaruddin reiterated that they never had any understanding with the petitioners or Seacorp for that matter at any time. The memorandum and articles of association of Seacorp are exhaustive of their relationship with other members of Onstream.

Before considering the application to strike out the petition, for the record it is clear from the facts and the documents that para 7.4 of the petition stating that "it was agreed that the petitioners on the one hand and Seacorp and Amanah Merchant Bank Berhad on the other would go into partnership with each other through Onstream" for the purpose of acquiring Scomi etc. is erroneous. Amanah Merchant Bank Berhad ("Amanah") is not a party to Onstream or a party to the petition. Surprisingly though, in para 7.4 of the petition Cartarama and Nasaruddin are not even mentioned as parties to the alleged "partnership" and I think rightly so perhaps as can be seen in the denials *vide* paras 11, 12 and 13 of the affidavit of Nasaruddin (encl. 10).

The answer given by the counsel for the petitioners in respect of Cartarama and Nasaruddin being joined as parties to the petition was that all the issues affecting all relevant parties could be disposed of at one hearing and cited *Foo Ban Nyen v. Foo Yet Kai & Sons Sdn. Bhd. & 6 Ors* [1991] 2 CLJ 1364 in support thereof. Be that as it may, as the matter before me is an application to strike out the petition by Cartarama and Nasaruddin, I will leave it at that.

The Issue

The principal and only ground relied on by the petitioners in presenting the petition for winding up of Onstream on just and equitable provision is on the basis of legitimate expectations and rights and they are according to para. 8.0 of the petition:

1. the petitioners would remain in management control of Onstream;
2. the petitioners would remain in control of the ordinary shareholding of Onstream;
3. any change in the constitution of Onstream both in its equity and in its management would be effected with their consent and/or in consultation with them;
4. the petitioners would maintain management control of Scomi through Onstream;
5. the petitioners would maintain equity control of Scomi through Onstream;
6. Ibrahim would be appointed and remain as managing director and executive deputy chairman of Scomi;
7. Ibrahim would draw a remuneration and emoluments from Scomi and its subsidiary, Kota Minerals and Chemicals Sdn. Bhd. ("KMC"); and
8. any change in the constitution of Scomi both in its equity and in its management would be effected with their consent and/or in consultation with them.

The petitioners contended that in breach and/or in denial of the petitioners' abovementioned legitimate expectations the second to fourth respondents individually and/or in combination and/or collectively committed the following acts or caused to be committed the following acts:

(a) removed Ibrahim as managing director of Scomi at the meeting of the board on 18 July 1996 and consequently removing all Ibrahim's executive functions in Scomi;

(b) appointed one Ridzuan Ali as chief operating officer of Scomi in his place;

(c) ceasing all remuneration and emoluments to Ibrahim from Scomi and KMC effective 1 July 1996;

(d) by failing to convene an extra ordinary general meeting of Scomi requisitioned by the petitioners on or about 2 August 1996;

(e) by failing to provide the petitioners with any or adequate opportunity to redeem the preference shares;

(f) by wresting control of the equity of Onstream through the transfer and conversion of the 1.5 million preference shares to Cartarama and Nasaruddin without consultation or due notice to the petitioners and not in the *bona fide* interest of Onstream;

(g) by wresting control of the equity of Scomi from the petitioners through the transfer and conversion of the 1.5 million preference shares to Cartarama and Nasaruddin without consultation or due notice to the petitioners and not in the *bona fide* interest of Onstream;

(h) by wresting control of the management of Onstream by the appointment of Nasaruddin, Koh Boon Thye and one Soohaimi Abdul Rahman to the board of Onstream without consultation or due notice to the petitioners;

(i) by wresting control of the management of Scomi by the appointment of Nasaruddin, Dato' Ibrahim bin Abdul Malek and Koh Boon Thye (Wong Kok Yong as his alternate); and

(j) by attempting to further dilute the petitioners' interest in Onstream by the increase in the authorised share capital to RM25,000,000 and a right issue of 8,505,000 new ordinary shares of RM1 each on the basis of three new ordinary shares for every existing one ordinary share resolved at the extraordinary general meeting of Onstream held on 24 April 1997.

The facts relied on by the petitioners that gave rise to the legal expectations and rights are set out in paras 7.5 and 7.6 of the petition.

From the facts that I can gather, the main players are the petitioners and Seacorp. Cartarama and Nasaruddin came in very much later (about a year) through Seacorp.

I think it is not disputed that Seacorp came into Onstream to raise capital for Onstream to acquire interests in Scomi. It would appear that Amanah provided the finance for the acquisition of Scomi by Onstream and hence perhaps it is not cited as a party to the petition though by way of para. 7.4 of the petition the petitioners claimed that they and Seacorp and Amanah would go into "partnership" with each other through Onstream for the purposes of:

(i) acquiring a controlling interest of not less than 65% in the equity of Scomi;

(ii) managing the business and affairs of Scomi;

(iii) achieving the listing of Scomi on the Kuala Lumpur Stock Exchange; and

(iv) expanding and rendering more profitable the business of Scomi.

It is rather surprising though that the petitioners in their alleged breaches and/or denial of their legitimate expectations and rights by the second to fourth respondents did not advance any grounds for, *inter alia,* the removal of Ibrahim as the managing director of Scomi and all executive functions in Scomi including ceasing his remuneration and emoluments from Scomi and Kota Minerals.

Seacorp, Cartarama and Nasaruddin contended that their participation in Onstream are purely commercial interests plain and simple and not on the basis of partnership like as claimed by the petitioners. In other words, their relationship as members, *vis-a-vis* the petitioners in Onstream are governed by the articles of association of Onstream as amended and the various documents executed by the parties.

The Law

After reviewing a number of authorities on the just and equitable provision as representing a sound and rational development, Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd. and Others* [1973] AC at p. 379 stated:

> The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timourous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own; that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts this definition is sufficient and exhaustive, equally so whether the company is large or small.
>
> Lord Wilberforce on the same page went on to state the "just and equitable" provision does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations that is of a personal character arising between one individual and another, which may make it unjust, or inequitable to insist on legal rights, or to exercise them in a particular way.

However, Lord Wilberforce in the next paragraph said:

> It would be impossible, and wholly undesirable to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company is not enough. **There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more ...** (bold is mine)

The elements set out by Lord Wilberforce are not exhaustive. The three elements set out therein, in my view, may not be applicable to this case given the factual situation. Hence there is the requirement of "something more" to be shown by the petitioners.

I agree with the submission of Mr. David Morais, counsel for the petitioners, that the distinction made in the cases of *Re Blue Arrow plc.* [1987] BCLC 585 and *Re Ringtower Holdings plc.* [1989] 5 BCC 82 was not so much that they were public companies but that their shareholding was held by numerous and disparate persons. Hence the reluctance of the courts to impose a mutual understanding on the legitimate expectations of the petitioners. Similarly, in respect of *Re Lo Siong Fong* [1994] 2 MLJ 72 which involved a private limited company but again the shareholding was numerous and disparate.

However, whether it be a public or a private company, it is the application of the principle and not the principle itself that was the consideration.

The Amendments

As I said earlier on, it is not disputed that the petitioners were the only shareholders of Onstream before they invited Seacorp to inject capital in Onstream with a view to acquiring Scomi. The primary object was to achieve the listing of Scomi on the Kuala Lumpur Stock Exchange.

With the intended participation of Seacorp in mind, the petitioners at the extra ordinary general meeting of Onstream on 2 August 1995 passed resolutions for amendments of the memorandum and articles of association of Onstream (see exh. "WO-l" in encl. 11).

The amendments, *inter alia*, provide for the increase of the authorised capital of Onstream to RM10,000,000 divided into RM10,000,000 redeemable convertible cumulative shares of nominal value of sen one (RM0.01) each and ten million ordinary shares of RM1 each and the issued share capital of Onstream be increased from RM1,335,000 of RM1 each to RM2,035,000 divided into 7,000,000 redeemable convertible cumulative preference shares of RM1 each (consisting of the nominal value of sen RM0.01 each and a share premium of sen RM0.99 each and 1,335,000 ordinary shares of RM1 each.

Arising out of the amendments made to the memorandum and articles of association of Onstream, a subscription agreement between the petitioners and Seacorp was executed on 8 August 1995 (exh. "H").

The Complaints

The complaints under para. 8.2 of the petition can be considered as follows:

Paragraphs 8.2.1. 8.2.2 And 8.2.3

At the board of directors meeting of Scomi held on 26 June 1996, Ibrahim was present and took part in the deliberations which, *inter alia*, was to address the financial woes of Scomi. From the draft minutes of the said board of directors meeting (at p. 414 of exh. "N" para. 4.8) Ibrahim did not record any objections to the proposal that the office of managing director be vacated in line with the budgetory savings and his appointment as managing director of Scomi was revoked with effect from 1 July 1996. However, it was agreed that Ibrahim will assume the position of non-executive deputy chairman and continue to draw an allowance from KMC. The draft minutes were confirmed at the board of directors meeting on 18 July 1996 in which Ibrahim was duly notified of the meeting. He did not raise any objection to the steps taken by the board of directors in which he was present. Apparently the decision was made in the best interests of Scomi based on the record of the minutes.

Paragraph 8.2.4

No evidence was shown by the petitioners of their requisitioning for an extra-ordinary general meeting except for a bare statement to that effect.

Paragraph 8.2.5

This complaint has no basis and there is provision for the petitioners to redeem the preference shares (see cl. 4.2.3(6) of exh. "H") but it has to be at a premium. (see p. 356 of exh. "H")

Paragraphs 8.2.6. 8.2.7. 8.2.8 And 8.2.9

By cl. 4.2.4(a)(iii) of exh. "H" corresponding to art. 4(d)(iv) and (v) the preference shares can be converted into ordinary shares before commencement of winding-up and further the preference shareholders are at liberty to transfer their preference shares to third parties with the exception of art. 23 (see cl. 10(d) of exh. "H" and art. 4(F) – exh. "WO1").

The allegations of the petitioners that they were not consulted etc. are really without any basis at all. Their claim of the legal expectations are to say the least has no foundation at all as the petitioners by their own action in regard to the amendments took away their discretion and agreed to be bound by the articles of association of Onstream as amended. As rightly pointed out by the counsel for Seacorp, Cartarama and Nasaruddin, the entry of Seacorp and subsequently Cartarama and Nasaruddin was purely commercial and to allege that it was more of a partnership like relationship has no basis at all. To top it up, the petitioners even went to the extent of claiming that Amanah is also a party to the alleged partnership when the role of Amanah was merely to lend money and it is not even a party to the petition.

As rightly stated in the case of *Re Grimm's Foods Ltd*, 99 DLR (3d) 377 [1980], a Canadian case, the issue of whether a company should be wound up is a question of fact to be decided in each case in light of certain general principles. The *Re Grimm's Foods Ltd's* case is a private company.

The petitioners seek equitable relief. The remedy is drastic and hence must be addressed to a serious condition affecting the proper conduct or management of Onstream's affairs.

On the facts and the various documents, the petitioners miserably failed to do so. At most it is a mere domestic quarrel between two sets of shareholders and this is insufficient – as Onstream itself is the proper forum for the settlement of domestic affairs of the majority under its constitution (see *Re Grimm's, supra*).

Here, the petitioners are still directors of Onstream and Ibrahim is still a director of Scomi though his executive powers were taken away. At most their shareholding may be reduced but again all the actions taken were, as I see them, within the constitution of Onstream and Scomi. There has been no evidence filed in support to show the directors have exceeded their powers or have exercised their powers for some illegitimate or ulterior purpose.

I recognise the exceptional nature of the jurisdiction to strike out a petition before discovery is complete and before there has been any cross examination. Having taken time to look carefully at the law and the facts set out in support of the petition and the affidavits in support of the motion to strike out the petition, I come to the conclusion that there is nothing to show or support the legal expectations complained of by the petitioners (see *Re Saul D. Harrison & Sons plc* [1994] BCC 475).

It would seem clear to me that whatever actions taken are to be found in the articles of association of Onstream as amended or in the general principles applicable to the conduct of its directors. It was the petitioners who moved and agreed to the amendments and consequently must be deemed to agree to be bound by those amendments. They must therefore be prepared to accept the consequences of their actions. The basis of the association is adequately and exhaustively laid down in the articles. It would be appropriate to quote the passage from the judgment of Vinelott, J and approved by the Court of Appeal at p. 501 in *Re Saul D. Harrison & Sons plc, supra*:

> The significant feature of the petition is that it is nowhere alleged that there is anything in the history of the company or the relationship between the shareholders which could be relied on as superimposing an equitable fetter on the exercise of the rights conferred by the articles of association of the company. Any legitimate expectation of the shareholders must be found in the articles of association or in the general principles applicable to the conduct of the directors of a limited liability company.

The issue now is whether the court should exercise its discretionary power under its inherent jurisdiction to strike out the petition without a trial? In this respect I should perhaps bear in mind the cautionary words of Lord Templeman in *Williams and Hubert v. W. & H. Trade Marks (Jersey) Ltd.* [1986] AC 368 at pp. 435-436:

> ... if an application to strike out involves a prolonged and serious arguments the judge, should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleadings but, in addition, is satisfied that striking out will obviate the necessity for a trial or will subsequently reduce the burden of preparing for trial or the burden of the trial itself.

I am satisfied that the second to the fourth respondents have shown that the petitioners' claims are manifestly unsustainable or an abuse of the process and justice requires that the petition be struck out forthwith (see *Re Ringtower Holdings plc* [1989] 5 BCC p. 84).

In the circumstances, I hereby strike out the petition with costs.